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SUPREME COURT OF THE UNITED STATES

OCTOBER 1946 TERM

No. 1420

D. M. PICTON & CO., INC.,

Petitioner,

versus

W. K. EASTES, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

AND

BRIEF IN SUPPORT THEREOF

M. A. GRACE,
EDWIN H. GRACE,
DAVID M. PICTON, JR.
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

The petition of D. M. Picton & Co., Inc., petitioning
from a final decree respectfully shows to this Honorable
Court:

ORIGIN AND NATURE OF CASE

W. K. Eastes, et als., as owners of a motorboat called
the Tramp filed a libel in admiralty against the Superior

Oil Company and against petitioner herein to recover damages alleged to have been sustained as a result of its motor-boat sinking in the Gulf of Mexico as a result of coming into contact with a submerged piling on the property of Superior Oil Company. The sinking occurred November 7, 1943 (Tr. 2).

As grounds of liability as against the Superior Oil Company it was alleged in the libel that on November 7, 1943, the Superior Oil Company employed the motorboat Tramp for the purpose of taking one of its employees from Cameron to an oil well being operated by it off shore in the Gulf of Mexico and to return with another employee who was then at the well.

That upon arriving at the well the operator of the motorboat stopped at a step or platform to let the employee of the Superior off and to let another employee get on said motorboat. That in backing away from said platform the motorboat struck a submerged piling in close proximity to the platform of Superior Oil Company. It is further alleged in the libel in substance that some five years before the sinking of the Tramp the Superior Oil Company erected this drilling platform out in the Gulf of Mexico and that the piling with which the Tramp came in contact with and sank was one of those driven by Superior Oil Company. It is still further alleged that sometime after the erection of this platform and as the uncontradicted testimony shows lightning struck and set fire to this platform and part of it was destroyed.

That on September 24, 1941, or more than 2 years before the sinking of the Tramp the Superior Oil Company

entered into a contract with petitioner D. M. Picton & Company, Inc., an independent contractor to " * * * recover and salvage from the floor of the Gulf of Mexico the oil drilling rig and equipment located and found by you including but not limited to the schedule of property attached to your said letter of September 4, 1941, and to pull and remove all pilings and timbers which were damaged and destroyed by lightning and fire at the cite of the Creole Drilling Platform in the Gulf of Mexico and that you would conduct the work of recovering, salvaging and transporting for the lump sum of \$9850. * * " See contract Tr. 566.

As is shown in the record (Tr. p. 569) and concerning which there is no dispute the first contract submitted by Superior Oil Company to petitioner D. M. Picton & Co., Inc., required that

"That prior to beginning your salvage operations you will deliver to this company at Houston, Texas a surety bond in the principal sum of \$10,000 upon form and with corporate surety acceptable to this company to assure the complete performance of your contract."

The testimony shows without contradiction that when this contract requiring the furnishing of a surety bond was submitted to petitioner D. M. Picton & Company, Inc., for its signature they refused to sign the same on the ground that they were unwilling to furnish such a bond. Thereafter the contract was redrafted by the Superior Oil Company in which it deleted the aforesaid provision as to fur-

nish bond, which contract in its redrafted form, Tr. 566, was accepted and the work in question done thereunder.

Some two years before the sinking of the Tramp petitioner, D. M. Picton & Company had completed their work, removed their equipment from Superior's premises and received in full payment from the Superior Oil Company of the agreed contract price. From that time until the time the motorboat sank on Superior's premises that company and that company alone was in full and complete possession of the premises and from day to day had motor vessels under contract to perform such services as the Tramp on the day of its loss was employed so to do.

The Superior Oil Company filed a petition under Supreme Court Admiralty Rule 56 to recover against D. M. Picton & Company, Inc., petitioner, the amount of any judgment that libelants-appellees might recover as against Superior Oil Company.

Petitioner D. M. Picton & Company, Inc., urged in its pleadings that the said contract was not maritime in nature, and the court, as a Court of Admiralty, had no jurisdiction to determine the claim of Superior Oil Company under said contract. Both lower courts held the contract to be maritime in nature, and within the Admiralty jurisdiction.

Petitioner further urged that the damages claimed by libelants-appellees were not in the contemplation of the parties; that the contract had been accepted by Superior Oil Company as completed prior to the alleged injury, and

therefore petitioner was relieved of any liability thereunder.

Petitioner urged in the alternative, that as Superior Oil Company was found guilty of negligence causing the injury, if petitioner was also negligent in not removing all pilings then petitioner and Superior Oil Company were jointly liable in tort for the injury, and damages should be divided.

Both lower courts held Superior Oil Company liable to libelants appellees for the injury and decreed judgment in full against said company, but rendered judgment over against petitioner, for the full amount of said judgment, thereby relieving Superior Oil Company of damages, and holding petitioner liable for the full amount thereof.

QUESTIONS PRESENTED

1. Is the contract to remove pilings driven in the bottom of a navigable body of water which had formed a part of a wharf or platform, a maritime contract, because said pilings constitute obstructions to navigation, over which a Court of Admiralty has jurisdiction?
2. That because the services under the contract were to be performed upon navigable waters, does such reason of itself constitute the contract maritime in nature and within the jurisdiction of Admiralty?
3. Where the wharf owner some two years after the contractor, petitioner, whom it employed to remove the

burned part of its wharf had completed its work, removed its equipment from the owner's premises, and received payment of the agreed contract price for full performance, and where contractor has refused to furnish a performance bond even though owner was to pay premium therefor, and who leaves a submerged piling which was one it contracted to remove, is such contractor liable for damages caused to a third party by the sinking of its motorboat by coming in contact with this piling in performing a contract with the wharf owner to transport employees to and from the wharf to shore, or is not that liability solely that of the wharfinger for failure to perform the duty imposed upon it as a wharfinger by negligently permitting this obstruction to remain in close proximity of its wharf.

4. If the wharfinger is liable in damages to the libellant for injury to his vessel caused by a dangerous submerged obstruction permitted to remain in close proximity to its wharf without warning or notice, and if the contractor, petitioner, failed to remove said obstruction under a contract with the wharfinger, can the wharfinger recover against the contractor, petitioner, the full amount of the damages awarded against it, or should not such recovery be limited to contribution of one-half the damages, upon the principle as applied in the admiralty when both parties are at fault.

5. Did not the lower courts err in holding as a matter of law that the damages awarded were in contemplation of the parties, with the undisputed facts showing that the contractor before signing the contract required that a clause therein requiring the contractor to furnish a performance bond, be and the same was deleted therefrom.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 5, 1947, (Tr. 598). Petition for rehearing was denied April 19, 1947, (Tr. 603). The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code as amended by Act of February 13, 1925 (T. 28 U. S. C. A. Section 347).

OPINIONS BELOW

The opinion of the United States District Court is reported in 65 F. Supp. 998.

The opinion of the Circuit Court of Appeals is reported in 160 F. (2d) 189.

A petition for rehearing (Tr. 599) was denied without opinion April 19, 1947.

REASONS RELIED ON FOR GRANTING OF THE WRIT

1. There is involved herein a decision of far reaching effect that a contract to remove pilings that had formed part of a wharf, is a maritime contract. Such holding is contrary to what has heretofore been the settled law for the following reasons, to-wit:

(a) That as the contract did not relate entirely to navigation and commerce on navigable waters, the holding of the Circuit Court of Appeals herein, is contrary to what has heretofore been considered as the settled law that for

a contract to be cognizable in the admiralty, the subject matter of the contract must relate entirely to navigation and commerce. The *Belfast v. Boon*, 7 Wall, 624, 19 L. Ed. 266; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *New England Mutual Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. ed. 90; *The Richard Winslow*, 7th Cir., 71 F. 426; *Berwind White Coal Mining Co. v. City of New York*, 2nd Cir., 135 F. (2d) 443.

(b) That because the contract was for services to be rendered on navigable waters, did not, of itself, make the contract maritime in nature, and cognizable in the admiralty, and such fact did not support the holding of the Circuit Court of Appeals herein. Locality is not the test as under the English rule, but the true criterion is the subject matter of the contract. *Insurance co. v. Dunham* 78 U. S. (11 Wall) 1; *North Pacific Steamship Co. v. Hall Bros. M. R. & S. Co.* 249 U. S. 119.

2. There is involved herein an important question of general law decided by the Circuit Court of Appeals herein in conflict with other Circuit Court of Appeals, in holding that a wharfinger who owes a duty to vessels invited to its wharf to afford a safe berth, and who, as the uncontradicted evidence shows, negligently permitted a dangerous submerged obstruction to remain in close proximity to its wharf, without warning or notice thereof, can hold the contractor, petitioner, who failed to move such obstruction under contract, liable for the full amount of damages decreed against the wharfinger for damage caused a vessel by said obstruction and after the wharfinger accepted the contract as completed and with actual or imputed knowledge of defective performance paid the agreed

contract price for the complete work. See: *Williams v. Edward Gillen Dock, Dredge & Const. Co.*, 6th Cir., 258 F. 591; *Schott v. Ingargolia*, 180 So. 462.

3. There is involved herein an important question of general admiralty law decided by the Circuit Court of Appeals herein in conflict with the Circuit Court of Appeals for the Second Circuit, and that is, in holding a wharfinger liable in damages in permitting a dangerous submerged obstruction to remain in close proximity of its wharf which thereby caused injury to a vessel invited thereto, and in granting said wharfinger judgment over in full against the contractor, petitioner, for having failed to remove said obstruction, and did not, if any liability existed against the contractor, petitioner, confine recovery to contribution of one-half of the damages. See *The Wonder* 2nd Cir., 79 F. (2d) 312. Such holding is also in conflict with the general admiralty law in tort where two parties are at fault for the injury, the damages caused thereby are always equally divided between said parties. See: *The Alabama* and the *Gamecock*, 92 U. S. 695, 23 L. Ed. 763.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 11755, *D. M. Picton & Co., Inc., et al, appellants vs. W. K. Eastes, et al, Appellees*, and that the said decree of the United

States Circuit Court of Appeals and of the United States District Court may be both, reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just.

M. A. GRACE,
EDWIN H. GRACE,
DAVID M. PICTON, JR,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CONTRACT INVOLVED WAS NOT A MARITIME CONTRACT

The contract was to remove piling that was damaged and destroyed by lightning and fire, and which had formed a part of a drilling platform. Upon such contract petitioner was impleaded under Supreme Court Admiralty Rule 56. The question therefore was invoked was whether such a contract was maritime to be cognizable in the admiralty. The Circuit Court of Appeals held the contract maritime in nature because the pilings were obstructions to navigation, and the services were to be rendered upon navigable

waters. As to the first ground, removal of a bridge, wharf, etc., would come within such criterion, if such be the law. But, we submit, that neither the removal of pilings which had formed part of a wharf, nor the driving of pilings in the bottom of the Gulf of Mexico, is a maritime contract, since the locality is not the test as under the English rule, but the true is the subject matter of the contract, which to be cognizable in the Admiralty, must relate entirely to navigation and commerce. The *Belfast v. Boon*, 7 Wall. 624, 19 L. Ed. 266; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *New Eglant Mutual Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. ed. 90; *The Richard Winslow*, 7th Cir., 71 F. 426; *Berwind White Coal Mining Co. v. City of New York*, 2d Cir., 135 F. (2d) 443; *North Pacific Steamship Co. v. Hall Bros. M. R. & S. Co.*, 249 U. S. 119.

That as the contract herein did not entirely relate to commerce and navigation, such contract was not maritime in nature cognizable in admiralty and the decision herein is erroneous, and should be corrected. That solely because navigation was incidentally involved as in a contract of sale of goods even though its performance involves the carriage of the goods on the seas to place of delivery does not make it a maritime contract. *Luckenbach S. S. Co. v. Gano Moore Co.* (D. C.) 298 F. 343. *Aktieselskabet Fido v. Lloyd Braziliero*, 2n Cir., 283 F. 62.

The contract herein not being maritime in nature, there was no right to implead petitioner under the fifty-ninth rule. *Aktieselskabet Fido v. Lloyd Braziliero*, 2nd Cir., 283 F. 62; *The Goyaz* (D. C.) 281 F. 259, aff. 2nd Cir. 3 F. (2d) 553; *Yone Suzuki Co. v. Central Argentine Ry.* (D. C.) 19 F. (2d) 645; *Rudy Petrick Seed Co. v. Kokussi*

Kisen Kabuskiki Kaisha, (D. C.) 1 F. Supp. 266; Trans-marine Corporation v. Fore Rive Coal Co. (D. C.) 28 F. (2d) 624. And the judgment rendered herein against petitioner was without the jurisdiction of the court, and should be set aside.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING DAMAGES SUSTAINED BY LIBELANT HEREIN WERE IN CONTEMPLATION OF PARTIES

The Circuit Court of Appeals at Tr. 593 in part says: "On the merits while we entirely agree with Picton that it would not be liable to Superior for the damages caused by libelant if such damages were not in the contemplation of the parties * * *" but concluded that such damages were in the contemplation of the parties.

We respectfully submit that the court erred in so holding. As to this we refer to the evidence which stands without contradiction, and which is as follows:

When the Superior Oil Company first contacted petitioner, it submitted to petitioner a form of contract for its acceptance. That contract appears at Tr. 568 and in part provides that:

"2. That prior to beginning your salvage operations you will deliver to this company at Houston, Texas a surety bond in the principle sum of \$10,000 upon form and with corporate surety acceptable to this company to assure the complete performance of your said contract, the premium of said surety bond to be paid for by the Superior Oil Company * * *"

Petitioner refused to sign this contract and returned it to the Superior Oil Company with the advice that they would not furnish such a bond. (W. M. Picton, Tr. 465). The Superior Oil Company then redrafted the contract and deleted from the contract the provision quoted from the original contract. In other words, they relieved petitioner from furnishing a performance bond. This contract and which petitioner accepted appears at Tr. 566.

We respectfully submit that the incontradicted facts above stated clearly show that it was not within the contemplation of the parties that petitioner would be responsible for such damages as claimed by and awarded libelants-appellees herein.

This is, we submit, is evidenced also by the following facts:

The contract price for this work was in the sum of \$9,850.00 and we submit it would not be reasonable to assume that petitioned would voluntarily assume an obligation to hold the Superior harmless, for its failure to properly perform this contract where damages could be very excessive. In this case the damages awarded libelants appellees with interest and costs approximate \$10,000.00. At the time the motorboat sank there could have been, although there was not, loss of life which would have run the damages up to many times that awarded to libelant-appellee herein.

**LIABILITY OF D. M. PICTON & CO., INC.,
PETITIONER, IF ANY, WAS ONE OF
TORT AND AS SUPERIOR WAS FOUND
GUILTY OF A TORT DAMAGES FOL-**

**LOWING THE WELL SETTLED RULE
SHOULD HAVE BEEN DIVIDED AS
BETWEEN THEM**

The District Court, Tr. 533, in speaking of the liability of The Superior Oil Company in part says:

“Superior immediately becomes liable for this disaster upon this proof because it could not leave such a dangerous hazard to navigation lying around, and so near within 142 feet, of its present re-installation. So it has to be held first liable to the libelants for whatever items of damage are to be developed later in this opinion.”

Page 536:

“The craft of libelants was invited to the premises by Superior to do work on that particular stormy day, so there can be no debate as to Superior's liability. It is more liable from this fact than if the Tramp had merely been independently cruising in the area. This intensified liability of Superior however is no excuse for Picton.”

The United States Circuit Court of Appeals in its opinion, Tr. 591 says:

“The judgment over in favor of Superior was right and must be affirmed.”

Any liability existing as against petitioner for the injury sustained herein is one solely in tort, and as petitioner and Superior Oil Company would be joint tort-feasors, and following the well settled doctrine of the admiralty in cases

of mutual fault, the damages should be divided between them. In this connection we refer to the case of *The Wonder*, 79 F. 2d 312 C. C. A. 2, a case which we have heretofore cited in this brief, and in which a suit was filed against the City of New York for damages to a tug caused when her propeller picked up a submarine power cable laying above instead of below, the river bed, in which suit the city impleaded the contractor which had contracted for installation of such cable for drawbridge.

The court at page 314 in part says:

"The city of New York apparently does not question its responsibility to the owner of the tug, but contends its liability is only secondary, and that it is entitled to full indemnity from J. Livingston & Co., because the latter improperly installed the cable. The intervening contractors and sub contractors other than J. Livingston & Co. were not liable in tort. So far as the record show they neither installed nor directed the installation of the cable in an improper manner, and J. Livingston & Co. and the city of New York were only actors in the matter. *City of New York v. Corn*, 133 App. Div. 1, 5, 117 N.Y.S. 514."

And at page 315 the court concluded that:

"The contractor here did not comply with its contract, hence the case differs radically as *Ryan v. Feeney & Sheehan Building Co.*, 239 N.Y. 43, 155 N.E. 321, 41 A.L.R. 81.

"Under the admiralty rule governing the situation the City is entitled to contribution from

the contractor, and the decree should be modified by providing that it recover from the latter one-half of the damages which may be established against it. As thus modified the interlocutory decree is affirmed."

We respectfully submit that under the decision of the lower courts that although they find the Superior Oil Company and petitioner each liable herein, petitioner is penalized for the full amount of damages, and which judgment if not reversed herein petitioner will be required to pay, which is contrary to the heretofore well settled admiralty practice. The *Alabama* and the *Game Cock*, 92 U. S. 695, 32 L. Ed. 763.

SUPERIOR OIL COMPANY WAS ESTOPPED TO CLAIM DAMAGES AGAINST PETITIONER

As shown by the uncontradicted testimony, that subsequent to the sinking of the *Tramp*, the Superior Oil Company on three different occasions (Tr. 334, 361, 288, 305), had no difficulty in locating the submerged obstruction (Tr. 288, 305, 334, 361). That company, as a wharfinger, either knew of such submerged obstruction, or because of lack of investigation, under the circumstances, notice thereof was imputed to it. *Smith v. Burnett*, 173 U. S. 430, 43 L. Ed. 756. But with actual knowledge or imputed knowledge of the said submerged obstruction, the same was permitted to remain, and under the holding of the Circuit Court of Appeals herein with complete immunity against damages, as under the decision herein, petitioner, even though its work was accepted as completed, and paid for full performance, without any agreement written or im-

puted, and certainly, without consideration therefor, remained, and continues to remain as an indemnitor for any damage suffered or many be suffered by Superior Oil Company, because of any obstruction that remained, or may remain, and even though petitioner refused to furnish a performance bond.

That when the Superior Oil Company paid petitioner, who, as is undisputed, was in good faith in the performance of the work, petitioner was then relieved of any further responsibility by virtue of the contract, and Superior Oil Company then stood in lieu thereof. *Williams v. Edward Gillen Dock, Dredge Const. Co., & 6th Cir.*, 258 F. 591; *Schott v. Ingargolia*, 180 So. 462.

In conclusion, we respectfully submit that the United States Circuit Court of Appeals for the Fifth Circuit has decided questions of considerable importance pertaining to the Admiralty, and contrary to the great weight of authority, and the applicable decisions of this Court, and that for the sake of harmony, a writ of certiorari should be granted petitioner as prayed for.

M. A. GRACE,
EDWIN H. GRACE,
DAVID M. PICTON, JR,
Counsel for Petitioner.